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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 799

ELIAS HACKNER, *et al.*,

Petitioners,

against

GUARANTY TRUST COMPANY OF NEW YORK and GEORGE WHITNEY, individually and as a member of the firm of J. P. Morgan & Co.,

Respondents,

and

J. P. MORGAN, *et al.*,

Defendants.

BRIEF ON BEHALF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RALPH M. CARSON,
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OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Second Circuit in this case (R. 46-51) is reported in 117 F. (2d) 95, Advance Sheets for March 10, 1941.

JURISDICTION

Petitioners invoke the jurisdiction of this Court under Judicial Code § 240-A, as amended by the Act of February 13, 1925.

STATEMENT

This action was brought by three plaintiffs, Hackner, Bowman and Ballinger, suing on behalf of themselves and all others similarly situated (R. 8). The gravamen of the complaint is that in October, 1931 they were wrongfully induced by the defendants' fraud to exchange certain Gold Notes, which they held, to their damage (R. 2-9). Admittedly the claim of each of the three original plaintiffs was less than the requisite jurisdictional amount. Subsequently these plaintiffs served an amendment to the complaint under Rule 15(a) by which they purported to drop Ballinger and add Eastman and York as party plaintiffs in his stead (R. 35-6). Eastman like the original plaintiffs had exchanged her notes but York had not (R. 36). Eastman's citizenship was different from defendants', and her claim exceeded $3,000.

Defendants' motion to dismiss the action for want of jurisdiction was granted (R. 39). The Circuit Court of Appeals affirmed the dismissal as to all the plaintiffs except Eastman (R. 62-3). Since the requisite jurisdictional grounds were present in so far as her claim was concerned, the Court did not force her to begin anew but continued her suit, considering that the same had been commenced by the service of the amendment (R. 49-51).

QUESTIONS PRESENTED

1. Whether the claims of the three original plaintiffs and of the other noteholders for whom they purported to bring the action may be aggregated so as to give the Court the jurisdictional amount required by statute.

2. Whether the subsequent addition of a claim with the requisite jurisdictional amount invested the Court with jurisdiction to determine the other plaintiffs' claims.

ARGUMENT

POINT I

THE CLAIMS CANNOT BE AGGREGATED FOR JURISDICTIONAL PURPOSES SINCE THEY ARE SEPARATE AND DISTINCT.

Where the claims of several plaintiffs in a single suit are separate and distinct, rather than joint and undivided, the amount involved in each separate controversy must be of the required jurisdictional amount. They cannot be added together to satisfy jurisdictional requirements. This rule is well established and of long standing. *Clay* v. *Field,* 138 U. S. 464, 479-80; *Troy Bank* v. *Whitehead,* 222 U. S. 39; *Pinel* v. *Pinel,* 240 U. S. 594, 596; *Lion Bonding Co.* v. *Karatz,* 262 U. S. 77; *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583.

Careful analysis of the complaint (R. 2-9) reveals that plaintiffs really seek to recover damages suffered because of defendants' alleged fraud. Over a thousand noteholders are alleged to have exchanged their notes on the false representations of the defendants (R. 7-8). To recover, each noteholder would have to show that he personally was induced to make the exchange of his notes by reason of the alleged misrepresentations. In making the exchange each noteholder in effect accepted the offer made by the corporation (Ex. C of complaint; R. 26-9). Each exchange thus constituted a separate and distinct contract or transaction. Whether fraud induced any of the exchanges must be determined in each individual case as a separate factual transaction. Some may have relied upon the balance sheet

(if false), and others not. Some who did rely may wish to affirm, rather than disaffirm their individual contracts.

Under these circumstances the Circuit Court properly held that this suit was a "spurious" class suit in that the claim of each noteholder was separate and distinct. *Ayer* v. *Kemper,* 48 F. (2d) 11, certiorari denied 284 U. S. 639. Aggregation of claims was therefore not permissible under the rule enunciated in the cases above cited. Petitioners' attempted distinction (Br. p. 10) of the four cases in this Court on which the Court of Appeals relied (at R. 49, not R. 50) is by no means apparent in all those cases. In only two did this Court confine its holding to appellate jurisdiction. At all events, no reason appears why the statutory restriction upon original jurisdiction should be more loosely construed than upon appellate jurisdiction; nor is it possible to contend that the statute-created jurisdiction of the District Court was enlarged by "the liberal construction of the new rules".

POINT II

JURISDICTION CANNOT BE CONFERRED BY BRINGING IN A PARTY WITH A CLAIM SUFFICIENT FOR JURISDICTIONAL PURPOSES.

By the purported amendment to the complaint Eastman, whose claim exceeded $3,000, was made a party plaintiff some time after the institution of the action. Such an addition could not confer jurisdiction which was originally lacking. *Pianta* v. *Reich Co.,* 77 F. (2d) 888, 890 (C. C. A. 2); *Ford, Bacon & Davis, Inc.* v. *Volentine,* 64 F. (2d) 800, 801 (C. C. A. 5). Furthermore in a

"spurious" class suit each claim must meet the jurisdictional test. *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 589-90, and other cases previously cited.

Rule 23 a (3), upon which petitioners rely, is merely a permissive joinder device in a "spurious" class suit. Moore's Federal Practice, § 23.04-(3), p. 2241; *Independence Shares Corporation* v. *Deckert*, 108 F. (2d) 51, 55, recently reversed by this Court on other grounds (85 Law ed. 170). Plaintiffs whose rights are "several" are allowed to join together in the same action for convenience' sake where "there is a common question of law or fact affecting the several rights. . . ." But in such a situation each of the original plaintiffs must still meet the jurisdictional requirements, although other persons with claims less than $3,000 may be subsequently allowed to intervene in the suit. Moore's Federal Practice, § 23.04-(3), p. 2241. Plaintiffs seek to reverse the process here by having a subsequent intervention by the plaintiff Eastman create jurisdiction lacking at the institution of the suit.

Rule 23 a (3) does not purport to alter the jurisdictional requirements. In fact Rule 82 specifically provides to the contrary:

> "*Jurisdiction and Venue Unaffected.* These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein."

In this connection it should be noted that the Court of Appeals' opinion in the present case was written by Judge Clark, reporter to the Committee which framed the new Rules of Procedure.

POINT III

THE DECISION HERE DOES NOT CONFLICT WITH DECISIONS RENDERED BY THE COURTS IN OTHER CIRCUITS.

The petitioners rely primarily on *Independence Shares Corporation* v. *Deckert,* 108 F. (2d) 51 (C. C. A. 3). But this case supports respondents' position. There a so-called class suit was brought by persons who were allegedly defrauded in the purchase of certain securities. None of the plaintiffs' claims exceeding $3,000, the Court very properly held that their claims could not be aggregated for jurisdictional purposes (p. 53). The Court found, however, that it had jurisdiction of the controversy by virtue of the provisions of the Securities Act of 1933. This Court in reversing (85 Law ed. 170) also upheld the jurisdiction solely on this ground, and not on the basis suggested by petitioners' choice of certain excerpts from the opinion. It said (p. 175):

> "We agree with the courts below that the Securities Act confers jurisdiction of the suit upon the District Court irrespective of the amount in controversy or the citizenship of the parties."

General Finance Corp. v. *Keystone Credit Corp.,* 50 F. (2d) 872 (C. C. A. 4), is also not in conflict with the decision in the instant case. There the plaintiffs sought to rescind for fraud a contract made by the stockholders of a corporation collectively and to restore to them collectively the fund created by the transfers made under the contract. Under these circumstances the Court found that the plaintiffs did not have separate claims but a common and un-

divided interest in the subject matter of the litigation so it was proper to permit joinder of claims of less than $3,000 with those of the original plaintiffs, some of whom in fact had claims of the required jurisdictional amount at the inception of the suit.

In *Jones* v. *St. Paul Fire etc. Co.,* 108 F. (2d) 123 (C. C. A. 5), there was only one plaintiff. Jurisdiction was founded upon the original form of the action, which was a bill in equity to reform an insurance policy for $50,000, and the insured had suffered damages greatly in excess of $3,000; see 98 F. (2d) at 449.

Railway Express Agency v. *Jones,* 106 F. (2d) 341 (C. C. A. 7), likewise does not conflict with the decision here. There the question was whether the defendant could file a counterclaim which was in the nature of a bill of interpleader. Some doubt was cast on the plaintiffs' right to maintain the action because it did not clearly appear whether any claims exceeded the jurisdictional amount, but the Court refused to make any final decision on this point and held that defendant had the right to interplead by virtue of the interpleader provisions of 28 USCA § 41, subd. 26. In the instant case, however, the claims of the three original plaintiffs concededly did not equal the necessary jurisdictional amount. And, as regards the language of the Court quoted at page 17 of petitioners' brief, the complaint in the instant case makes clear by its very allegations that the suit is not a proper class suit, or in any event that it is not brought to enforce a single title or right.

A mere reading of *First State Bank* v. *Chicago R. I. & P. R. Co.,* 63 F. (2d) 585 and *Fitchett* v. *Blows,* 74 Fed. 47 (C. C. A. 8), will show that they do not support the proposition for which petitioners cite them (Br. p. 15).

POINT IV

DISMISSAL AS TO PLAINTIFF YORK WAS PROPER.

Grace York was added as a party plaintiff after the institution of the suit of which the Court lacked jurisdiction at its inception. She held $6,000 of Gold Notes which she did not exchange as the other plaintiffs had done. She is not in the same class as the plaintiff Eastman or the original plaintiffs. No fraud is alleged to have been practiced on her. Defendants' alleged misrepresentations did not induce her to do anything. They had no bearing on her retention of the notes. It does not appear in the complaint that she has been damaged, if at all, in any specific amount for which defendants are responsible. The complaint is drawn strictly from the standpoint of the noteholders who participated in the exchange. Adding York as a party was a mere after-thought. Moreover, if she had been led by defendants' alleged fraud to make the exchange, she would have lost only $3,000, which would be less than the required jurisdictional amount. In no event could the defendants be chargeable for any further loss.

CONCLUSION

This case does not raise questions of any special gravity or general importance. The legal questions presented are elementary. The decision of the Circuit Court of Appeals, which petitioners desire to have reviewed, is in complete accord with the law of jurisdiction as announced by decisions of this Court, and does not conflict with the decisions

made by Circuit Courts of Appeals in other circuits. There has been no misinterpretation of the Federal statutes or the new Rules of Procedure.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

RALPH M. CARSON,
Counsel for the Respondents.

Dated, New York, N. Y., March 26, 1941.